Best Re (L) Ltd v Hanwha General Insurance Co Ltd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24NCC-411-11 OF 2012
HAS ZANAH MEHAT J
19 APRIL 2013

Civil Procedure — Injunction — Injunction to restrain winding up petition — Governing principles — Dispute over payment of insurance claims — Disputed issues only raised after issuance of s 218 winding up notice — Whether allegations merely an afterthought to stifle presentation of winding up petition — Whether allegations inconsistent with undisputed contemporary documents — No bona fide dispute

Companies and Corporations — Winding up — Injunction to restrain petition — Application for Fortuna injunction — Governing principles — Dispute over payment of insurance claims — Disputed issues only raised after issuance of s 218 winding up notice — Whether allegations merely an afterthought to stifle presentation of winding up petition — Whether allegations inconsistent with undisputed contemporary documents — No bona fide dispute

Evidence — Expert evidence — Foreign law — Duty of court — Court to decide as a question of fact — Experts merely to provide assistance and guidance to court

The plaintiff was a reinsurance company incorporated in Labuan. The defendant was a licensed general insurance company incorporated in Korea. The defendant entered into three Phone Safe Insurance Policy contracts with SKT Mobile (SKT), a Korean telecommunications company, to provide insurance coverage to SKT's customers in the event of, inter alia, loss or damage of mobile phones purchased from SKT (SKT Policies). The defendant approached the plaintiff for a quotation of their charges to provide the defendant with reinsurance coverage for the SKT Policies. The plaintiff reverted with quotations to provide reinsurance coverage as requested by the defendant (rate quotations). The rate quotations were duly accepted by the defendant and the reinsurance policies came into effect (Reinsurance Policies). Thereafter various claims were made by the defendant under the Reinsurance Policies. The plaintiff made partial payment of these claims but were unable to meet their obligation under the Reinsurance Policies to settle the claims made by the defendant. The defendant's solicitors issued a notice pursuant to s 218(2)(a) of the Companies Act 1965 ('the Act') for the plaintiff to remit the September installment within three weeks ('s 218 notice'). The plaintiff applied

for injunction to restrain the defendant from presenting a winding up petition against it pursuant to s 218 of the Act, or commonly known as fortuna injunction.

Held, dismissing the originating summons with costs:

(1) The principles of law on fortuna injunction taken from the Australian case of *Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation of the Commonwealth of Australia* is well settled. One of the test laid down in granting the injunction is where the winding up petition when presented, would have no chance of success as the debt is not disputed on substantial ground. The principle has been adopted and applied in our courts. The burden fell squarely on the plaintiff to satisfy the court with 'clear and persuasive' grounds that the September installment due to the defendant was 'bona fide disputed on substantial grounds' (see para 18).

(2) The plaintiff alleged that the September installment was disputed under Korean law on the existence of any valid and full reinsurance contract between the plaintiff and the defendant for the SKT Policies; whether the defendant had properly handled each and every claim under the SKT Policies; and whether the defendant had complied with all of the requirements under the terms of the SKT Policies. However, these issues were not raised by the plaintiff until after the defendant had issued s 218 notice to demand for payment due for the September installment (see paras 21–22).

(3) The allegation of the plaintiff was plainly and simply an afterthought calculated to stifle genuine statutory right to present a winding up petition against it and the allegation was inconsistent with undisputed contemporary documents where the plaintiff had admitted in all these contemporary documents that the September installment was due and payable to the defendant (see para 24).

(4) On the allegation raised by the plaintiff that the debt had to be settled by the Korean court, the plaintiff produced an opinion from one Mr Young Hwa Suhr whilst the defendant sought an expert opinion from Mr Rim Chi Yong. Notwithstanding the opinions of the experts presented to the court, it was incumbent on the court to decide as a question of fact what the foreign law was. The experts were not entitled to decide the issue, their views were merely there to provide assistance and guidance to the court (see paras 28 & 35).

(5) The plaintiff had failed to establish that the September installment was bona fide disputed on substantial grounds. On the contrary, the contemporary documents showed that the September installment was acknowledged, accepted and admitted by the plaintiff. Therefore, the

defendant should not be prevented from exercising its statutory right to present a winding up petition against the plaintiff for its failure to comply with s 218 notice (see para 37).

[Bahasa Malaysia summary

Plaintif merupakan syarikat insurans semula yang ditubuhkan di Labuan. Defendan merupakan syarikat insurans am berlesen yang ditubuhkan di Korea. Defendan memeterai tiga kontrak Polisi Insurans Keselamatan Telefon dengan SKT Mobile (SKT), sebuah syarikat telekomunikasi Korea, untuk memberikan perlindungan insurans kepada pelanggan-pelanggan SKT sekiranya berlaku, antara lain, kehilangan atau kerosakan telefon mudah alih yang dibeli daripada SKT (polisi SKT). Defendan menemui plaintif untuk sebut harga mereka bagi memberikan defendan perlindungan insurans semula terhadap polisi SKT. Plaintif memberikan sebut harga untuk menyediakan perlindungan insurans semula seperti yang diminta oleh defendan (harga sebut harga). Harga sebut harga diterima sewajarnya oleh defendan dan polisi insurans semula berkuatkuasa (Polisi Insurans Semula). Seterusnya beberapa tuntutan dibuat oleh defendan di bawah Polisi Insurans Semula. Plaintif membuat sebahagian bayaran kepada tuntutan-tuntutan ini tetapi tidak dapat memenuhi kewajipan mereka di bawah Polisi Insurans Semula untuk menyelesaikan tuntutan-tuntutan yang dibuat oleh defendan. Peguam cara defendan mengeluarkan satu notis menurut s 218(2)(a) Akta Syarikat 1965 ('Akta') untuk plaintif meremit ansuran bagi bulah September dalam jangkamasa tiga minggu ('notis s 218'). Plaintif memohon untuk injunksi bagi menahan defendan daripada menyerahkan satu petisyen penggulungan terhadapnya menurut s 218 Akta, atau secara umumnya dikenali sebagai injunksi fortuna.

Diputuskan, menolak saman pemula dengan kos:

(1) Prinsip undang-undang mengenai injunksi fortuna diambil daripada kes Australia iaitu *Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation of the Commonwealth of Australia* yang diputuskan dengan sebaiknya. Satu daripada ujian yang digunakan untuk membenarkan injunksi ialah apabila petisyen penggulungan diserahkan, tiada peluang untuk berjaya memandangkan hutang tersebut dipertikaikan atas alasan kukuh. Prinsip tersebut diambil dan oliguna pakai di dalam mahkamah kita. Beban terletak sepenuhnya ke atas plaintif untuk memuaskan mahkamah dengan alasan yang 'jelas dan mendesak' bahawa ansuran bagi bulah September yang perlu dibayar kepada defendan adalah 'dipertikaikan secara bona fide atas alasan kukuh' (lihat perenggan 18).

(2) Plaintif mendakwa bahawa ansuran bagi bulah September dipertikaikan di bawah undang-undang Korea atas kewujudan mana-mana kontrak insurans semula yang lengkap dan sah di antara plaintif dan defendan untuk Polisi SKT; sama ada defendan telah mengendalikan setiap dan

kesemua tuntutan di bawah Polisi SKT dengan sewajarnya; dan sama ada defendan telah memenuhi kesemua keperluan di bawah terma-terma Polisi SKT. Walau bagaimanapun, isu-isu ini tidak dikemukakan oleh plaintif sehinggalah defendan mengemukakan notis s 218 untuk menuntut bayaran yang perlu dibayar bagi ansuran bagi bulah September (lihat perenggan 21–22).

(3) Dakwaan plaintif secara ringkas dan jelas merupakan sesuata yang difikirkan kemudian yang dibuat untuk menyekat hak statutori sah untuk menyerahkan petisyen terhadapnya dan dakwaan tersebut adalah tidak konsisten dengan dokumen-dokumen terkini yang diakui plaintif di dalam kesemua dokumen terkini tersebut bahawa ansuran bagi bulah September perlu dibayar kepada defendan (lihat perenggan 24).

(4) Berdasarkan dakwaan yang dikemukakan oleh plaintif bahawa hutang tersebut telah dijelaskan oleh mahkamah Korea, plaintif mengemukakan satu pendapat daripada Encik Young Hwa Suhr manakala defendan memohon satu pendapat pakar daripada Encik Rim Chi Yong. Walau apapun pendapat-pendapat pakar yang dikemukakan kepada mahkamah, adalah jelas bagi mahkamah untuk menentukan persoalan fakta mengenai apa itu undang-undang asing. Pakar-pakar tidak berhak menentukan isu tersebut, pendapat mereka hanyalah untuk memberikan bantuan dan panduan kepada mahkamah (lihat perenggan 28 & 35).

(5) Plaintif telah gagal untuk membuktikan bahawa ansuran bagi bulah September dipertikaikan secara bona fide atas alasan yang kukuh. Sebaliknya, dokumen terkini menunjukkan bahawa ansuran bagi bulah September diluluskan, diterima dan diakui oleh plaintif. Oleh itu, defendan tidak seharusnya dihalang daripada melaksanakan hak statutorinya untuk menyerahkan petisyen penggulungan terhadap plaintif atas kegagalannya untuk mematuhi notis s 218 (lihat perenggan 37).]

Notes

For cases on foreign law, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1795–1799.

For cases on injunction to restrain petition, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1375–1394.

For cases on injunction to restrain winding up petition, see 2(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 3614–3618.

Cases referred to

Azure Precision (M) Sdn Bhd v John While Springs (S) Pte Ltd [2003] MLJU 358, HC (refd)

Dato' Tai Boon Tatt v Alaf Pelangi Sdn Bhd [2011] 1 LNS 301, HC (refd)

Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation of the Commonwealth of Australia [1978] VR 83, SC (refd)

Hasrat Usaha Sdn Bhd v Pati Sdn Bhd [2011] 3 MLJ 343; [2011] 2 CLJ 863, CA (refd)

H156, The [1999] 3 SLR 756, HC (refd)

Lafarge Concrete (M) Sdn Bhd v Gold Trend Builders Sdn Bhd [2012] 6 MLJ 817; [2011] 1 LNS 1763, CA (refd)

Medallion Builders Sdn Bhd v Sinarlim Sdn Bhd [2010] MLJU 1707, HC (refd)

Sunshine Securities (Pte) Ltd, Re; Sunshine Securities Pte Ltd & Anor v Official Receiver and Liquidator of Mosbert Acceptance Ltd [1978] 1 MLJ 57, CA (refd)

Tan Kok Tong v Hoe Hong Trading Co Sdn Bhd [2007] 4 MLJ 355, CA (refd)

Westform Far East Sdn Bhd v Connaught Heights Sdn Bhd and other appeals [2010] 3 MLJ 459, CA (refd)

Legislation referred to

Companies Act 1965 s 218, 218(2)(a)

Loo Peh Fern (Syaheera with him) (Skrine) for the plaintiff.

G Vijay Kumar (Wong Shir-Leen and Teo Ju-Li with him) (Lee Hishamuddin Allen & Gledhill) for the defendant.

Has Zanah Mehat J:

INTRODUCTION

[1] The plaintiff's application in encl 1 is for the following orders:

(a) a declaration that the defendant is not entitled to present a winding up petition for the winding up of the plaintiff based on the sum of USD6,519,874.08;

(b) an injunction to restrain the defendant from presenting a winding up petition based on the same amount in the notice of demand dated 29 October 2012; and

(c) costs.

[2] In short this is the plaintiff's application for injunction to restrain the defendant from presenting a winding up petition (petition) against it pursuant to s 218 of the Companies Act 1965 ('Act'), or commonly known as fortuna

injunction.

THE FACTS

[3] The plaintiff is a reinsurance company incorporated in the Federal Territory of Labuan.

[4] The defendant is a licensed general insurance company incorporated in Korea.

[5] The defendant entered into three Phone Safe Insurance Policy contract with SKT Mobile (SKT), a Korean telecommunications company, to provide insurance coverage to SKT's customers in the event of, inter alia, loss or damage of mobile phones purchased from SKT ('SKT Policies').

[6] The defendant approached the plaintiff for a quotation of their charges to provide the defendant with reinsurance coverage for the SKT Policies.

[7] The plaintiff reverted with quotations to provide reinsurance coverage as requested by the defendant (rate quotations). These rate quotations stated the amount of premium to be payable to the plaintiff as well as the percentage of coverage that will be provided. The rate quotations were duly accepted by the defendant and it is not in dispute that the reinsurance policies came into effect ('Reinsurance Policies').

[8] Thereafter various claims were made by the defendant under the reinsurance policies. The plaintiff made partial payment of these claims but were unable to meet their obligation under the reinsurance policies to settle the claims made by the defendant.

[9] On 31 October 2012, the defendant's solicitors issued a notice pursuant to s 218(2)(a) of the Act for the plaintiff to remit the September installment within three weeks ('s 218 notice').

THE PLAINTIFF'S CASE

[10] The plaintiff averred that there was no full disclosure by the defendant when they requested for the rate quotations for reinsurance in not disclosing the version one of SKT Policies and any losses incurred in respect of SKT Policies. The plaintiff was only given the version two and three of the SKT Policies with the Master Schedule for version one, two and three September 2012. The plaintiff further averred that the defendant did not confirm the acceptance of the rate quotations, no inception date of risks and no closing slips

confirming the original terms and conditions and the premium to be charged. The plaintiff also averred that the rate quotations did not comply with the Korean law and the defendant has failed to substantiate its claims with documentations. As there is a dispute, it shall be determined by the Seoul Central District Court in Korea as agreed in the supplementary agreement and the term in SKT Policies. Therefore, the plaintiff contended that the amount claimed based on s 218 notice is bona fide disputed on substantial grounds.

THE DEFENDANT'S CASE

[11] In its email of 3 February 2012 (exh A-4 of the defendant's affidavit in reply ('AIR'), the plaintiff acknowledged that it has delayed payment of claims and pledged to pay outstanding balances due to the defendant by way of installments in accordance with the payment schedule attached to the email. It also advised that it will involve its broker, PAIB Company Ltd ('PAIB') to remit part of the outstanding amount due to the defendant. Paragraph C and D of the email stated the following:

> C. BEST RE will pay out the outstanding net balances of the above program as per payment schedule attached hereto for your information. As promised, we will pay out net balances up to June 2011 by the end of March 2012. We regret for delays in early settlement schedules due to Chinese New Year holidays and King's birthday in the early next week.
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> D. As you would find out from our settlement schedule, a new broker, PAIB Company Limited will be involved for the remittance of installed payments of the net balances and please do not hesitate to let us know if you have any other suggestion to our settlement schedule since we are open to discuss.

[12] Following the said email, the defendant and the plaintiff entered into an agreement on 24 February 2012, to record the plaintiff's pledge to pay the outstanding amounts owing to the defendant by way of monthly installments (existing agreement). The existing agreement also recorded the plaintiff's proposal to remit 2/3 of each monthly installment through its broker, PAIB.

[13] The defendant averred that notwithstanding the execution of the existing agreement, the plaintiff, again defaulted and failed to pay the defendant according to its proposed monthly installment schedule (paras 16-17 and exh A-6 of the defendant's AIR).

[14] As a result of the plaintiff's default, parties met to discuss the way forward on 5 May 2012 in Kuala Lumpur. The plaintiff requested for indulgence of the defendant to restructure the installment payments. It was agreed at this meeting that the monthly installment will be restructured and

that the plaintiff must meet the revised schedule in order to regain the trust of the defendant (para 18 and exh A-7 of defendant's AIR).

[15] Following the meeting in Kuala Lumpur, the defendant and the plaintiff signed a supplementary agreement to the existing agreement on 1 June 2012 (supplementary agreement). In this supplementary agreement, the plaintiff expressly acknowledged that it has delayed payment of outstanding amounts due to the defendant. It also pledged to remit the outstanding sums due to the defendant by way of the revised installment scheduled provided in the supplementary agreement (paras 19-10 and exh A-8 of defendant's AIR).

[16] The plaintiff made the first installment payment provided in the supplementary agreement, although it was delayed by two months. However, the plaintiff defaulted in making the second installment payment due in September 2012 (September installment), and all other installment payments thereafter due under the supplementary agreement (paras 28–32 and 41 of defendant's AIR). Despite expressly notifying the defendant by email that it was going to remit the September installment payment, the plaintiff failed to remit the payment (notification emails, particularly exhs A-24 and A-25 of defendant's AIR).

[17] The defendant's repeated request/demands for an explanation as to why payment was not made was not replied by the plaintiff. The plaintiff had defaulted after making just one installment payment under the supplementary agreement.

FINDINGS

Whether there is a bona fide disputed debt on substantial grounds

[18] The principles of law on fortuna injunction taken from the Australian case of *Fortuna Holdings Pty Ltd V The Deputy Commissioner Of Taxation of the Commonwealth of Australia* [1978] VR 83 is well settled. One of the test laid down in granting the injunction in this case is where the winding up petition when presented, would have no chance of success since the debt is not disputed on substantial ground. The principle has been adopted and applied in our courts. In *Tan Kok Tong v Hoe Hong Trading Co Sdn Bhd* [2007] 4 MLJ 355, the Court of Appeal at p 360 of the report at para [8] stated:

> When deciding whether to grant an injunction to restrain a petition that is based on a statutory demand for a debt, the court must be satisfied that the debt is bona fide disputed on substantial grounds (see *Stonegate Securities Ltd v Gregory* [1980] 1 All ER 241). It is not enough that there is a serious question to be tried. In other words, this is one of those cases to which the general test laid down in *American Cynamid Co v Ethicon Ltd* does not apply.

[19] On the burden of proof, it has been succinctly restated by the Court of Appeal in *Westform Far East Sdn Bhd v Connaught Heights Sdn Bhd and other appeals* [2010] 3 MLJ 459 at para [80] stated:

> … I shall begin with the basic principles governing interlocutory applications to restrain the presentation of winding-up petitions. It hardly needs saying that a court of law must respect and protect the defendant's right to file the winding-up petition — a right conferred by statute namely, s 218 of the Companies Act — if the defendant honestly believes that they have the right to do so, so long as the exercise of such right is not an abuse of process. This bacis principle was laid down *Bryanstone Finance Ltd v de Vries* (No 2) …

and in para [82] His Lordship further stated:

> In short, the above judgment enunciated the 'abuse of process' principle. But it is pertinent to note from the above passages that the party who alleges that prima facie there is an abuse of process (and in the context of the present case, it is the plaintiff) must satisfy this court with 'clear and persuasive grounds'.

[20] Based on the principles enunciated by the above cases, it is plain that the burden falls squarely on the plaintiff to satisfy this court with 'clear and persuasive' grounds that the September installment due to the defendant is 'bona fide disputed on substantial grounds'.

Alleged disputed of September installment

[21] The plaintiff alleges that the September installment is disputed under Korean law on:

(a) the existence of any valid and full reinsurance contract between the plaintiff and the defendant for the SKT Policies;

(b) whether the defendant has properly handled each and every claim under the SKT Policies; and

(c) whether the defendant has complied with all of the requirements under the terms of the SKT Policies.

[22] I find from various exhibits filed, the above issues were not raised by the plaintiff until after the defendant had issued s 218 notice to demand for payment due for the September installment. In fact based on the emails of 21 September 2012 and 24 September 2012 (exhs A-24 and A-25 of defendant's AIR) between the plaintiff and the defendant, and its broker (PAIB) have calculated its respective shares amounting to USD6,519,874.08

(the amount stated in s 218 notice).

Existence of reinsurance policies

[23] The plaintiff disputes on the existence of the reinsurance policies but has unequivocally admitted the existence and validity of the reinsurance policies in the email dated 3 February 2012, the existing agreement the supplementary agreement and notification emails (particularly in exhs A-11 to A-24 of defendant's AIR). I am of the opinion this allegation is plainly contrived and not bona fide. In fact the plaintiff acknowledged and admitted debts it owed to the defendant under the reinsurance policies, including the September installment based on these documents.

[24] Therefore, I find that the allegation of the plaintiff is plainly and simply an afterthought calculated to stifle genuine statutory right to present a winding up petition against it and the allegation is inconsistent with undisputed contemporary documents where the plaintiff has admitted in all these contemporary documents that the September installment is due and payable to the defendant. It is settled law, when considering affidavit evidence, the court must reject any assertions of fact, denial or dispute by a party that is equivocal or lacking in precision or is inconsistent with undisputed contemporary documents.

[25] Further it has never been the plaintiff's position at all material time that the defendant must first prove that it has properly handled each and every claim under the SKT Policies before the defendant is entitled to make a claim under the reinsurance policies. I find that the plaintiff has not referred to any contractual clause or provision to substantiate its contention. Therefore, this allegation is wholly without substance.

[26] The plaintiff also alleges the defendant has not complied with all terms of the SKT Policies. I find that this assertion is lacking in precision and devoid of particulars. It is not stated what terms of the SKT policies that the defendant has purportedly not complied with. This allegation also has never been raised by the plaintiff at all material time and in any contemporary documents. Therefore, it is an afterthought.

[27] Finally, based on the evidence as mentioned above, the September installment has been expressly admitted by the plaintiff to be due and payable to the defendant (exhs A-23 and A-24 of the defendant's AIR). To my mind if there was any non-compliance with the terms of the SKT Policies as alleged by the plaintiff why would the plaintiff expressly admitted and agreed to pay the

September installment to the defendant.

Korean law

[28] On the allegation raised by the plaintiff that the debt has to be settled by the Korean court, the plaintiff has produced an opinion from an individual known as Mr Young Hwa Suhr (Mr Suhr) practicing in the firm of Pusan Pacific Law Firm. The defendant also has sought for an expert opinion from Mr Rim Chi Yong, a senior lawyer and a former senior judge of the Seoul Central District Court (Mr Rim).

[29] The defendant submitted that the opinion of Mr Suhr should not be accepted as expert opinion by this court on two grounds:

(a) Mr Suhr is not independent. It is admitted in his opinion that his firm acts as Korean solicitors for the plaintiff. The law is clear, an expert must be independent from and have no interest whatsoever in the litigation or have any affiliation to the litigants; and

(b) Mr Suhr has not informed the court about his qualifications, his experience and background. There is nothing for this court to safely satisfy itself that Mr Suhr is indeed and expert who is suitably qualified to give his opinion on this matter.

[30] The defendant further submitted, in any case, even if Mr Suhr's evidence is to be accepted, there should be very little weight that should be attached, if any, to his opinion. The court, according to the defendant, should prefer the opinion of the defendant, Mr Rim. Mr Rim's reasons why the September installment cannot be considered a bona fide disputed debt under Korean law at pp 53–54 of defendant's AIR, inter alia, as follows:

(a) Having reviewed the content of the documents and correspondences, there exists valid reinsurance contracts between Hanwha (the defendant), as the original reinsurer and Best Re (the plaintiff), as the reinsurer;

(b) Under Korean law on reinsurance contracts, the plaintiff as a reinsurer would be under an obligation to pay the relevant proceeds as long as Hanwha, the original insurer has the obligation to pay the original insurance proceeds. This with the exception that the reinsurer can prove that there exists any event of execution which is applicable to the original insurer's claims;

(c) If this case were presented to a Korean court, it is unlikely that it would accept Best Re's arguments disputing or denying its liability under the reinsurance contracts as —

(i) It is unlikely that a Korean Court will accept Best Re's defence of its

exemption of liability under the reinsurance contracts unless detailed supporting evidence of the same is submitted;

(ii) Best Re has not disputed or raised any issues or objections regarding its liability on the existence or amount of the debt due to Hanwha until 29.10.2012, via its solicitor's letter.

(iii) Best Re had entered into the Existing Agreement and Supplementary Agreement providing that the reinsurance proceeds should be paid in installments and can therefore be considered to have expressly acknowledged its liability to pay the debt;

(iv) Best Re had paid the relevant reinsurance proceeds installments for the period of July and August 2011. It is therefore possible to decide that there was an implied agreement between parties of Best Re's liability that Best Re would not deny its liability to pay the reinsurance proceeds installment in a similar manner for later periods claimed by Hanwha;

(v) Best Re's sudden change in attitude i.e by disputing its liability to pay the remaining reinsurance proceeds installments after agreeing to pay, and having paid them, could be regarded as an action in bad faith.

(d) Based on the emails of 21.9.2012 and 24.9.2012 between Hanwha and Best Re and Best Re's Broker, Best Re and its Broker have calculated its respective shares for the September period 2011, which is payable by September 2012. Accordingly, Hanwha and Best Re are considered to have agreed on the amount of balance by Best Re's Broker to be paid to Hanwha for the September 2012 installment;

(e) The jurisdiction clause in the Supplementary Agreement does not grant exclusive jurisdiction to the Seoul District Court. It is limited to civil matters;

(f) As the valid existence and bankruptcy of a company, including the winding-up of a company, is generally subject to the exclusive jurisdiction of the country under the law of which the company has its center of main interest, it will not be governed by the jurisdiction clause under the Supplementary Agreement;

(g) Further, any attempts by Best Re to dispute its debt obligation before the Korean Courts, is likely to be unsuccessful as there seems to be no dispute of any significance in terms of liability and quantum between Hanwha and Best Re.

(h) Having understood the law in Malaysia on injunctions to restrain the presentation of winding-up petitions, there is no basis for Best Re to obtain such an injunction in Malaysia against Hanwha because the debt cannot be disputed by Best Re on substantive grounds under Korean Law.

[31] As noted by Mr Rim, the opinion of Mr Suhr centers on matters that have been the position taken by the plaintiff at the material time. On the

contrary, the plaintiff, has, after receiving all the relevant documents from the defendant, unequivocally admitted the September installment owing to defendant. Mr Suhr, has failed to address the issue of the express admissions made by the plaintiff and its consequential effect.

[32] On the contrary, Mr Rim has stated the following regarding the admissions made by the plaintiff:

> 23. As far as I understand from the documents provided to me, Best Re has not disputed the existence or the amount of Debt due to Hanwha. On the contrary, Best Re entered into the Existing Agreement in February 2012 and the Supplementary Agreement in June 2012 providing that the reinsurance proceeds should be paid in installments and can therefore be considered to have expressly acknowledged its liability to pay the Debt. According to the foregoing agreements, Best Re (either directly or through its broker PAIB Company Limited ('PAIB') has paid the required installments for July 2011 by June 2012 and for August 2011 by August 2012.
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> 24. It is my understanding that Best Re had not raised any issues or objections regarding its liability to pay the Debt prior to 29 October 2012, when it purported to do so for the first time via the letter of its counsel, Skrine.
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> 25. As Best Re has paid the relevant insurance proceeds installments for the period of July and August 2011, it would be possible for the Korean court to decide that there was an implied agreement between Hanwha and Best Re that Best Re would not deny its liability to pay the reinsurance proceeds installment for later periods claimed by Hanwha in a similar manner. In addition, I am of the opinion that Best Re's such sudden change of attitude, ie disputing its liability to pay the remaining reinsurance proceeds installments, could be regarded as action in bad faith, with the result that a Korean court would be unlikely to accept such arguments from Best Re in light of the current circumstances.

[33] I find that although Mr Suhr has touched on other matters raised in Mr Rim's opinion, he has failed to address or respond to these paragraphs. The treatment of admissions by a party in Malaysia and Singapore courts is the same as decided in many cases. In *Re Sunshine Securities (Pte) Ltd; Sunshine Securities Pte Ltd & Anor v Official Receiver and Liquidator of Mosbert Acceptance Ltd* [1978] 1 MLJ 57 (the Court of Appeal of Singapore stated at p 59 the following):

> Having regard to the clear and unequivocal admission of the petitioner's debt contained in the first letter the learned judge was entitled to come to the conclusion that there was no bona fide dispute.

[34] The same views were expressed by the Court of Appeal and the High Court in *Lafarge Concrete (M) Sdn Bhd v Gold Trend Builders Sdn Bhd* [2012] 6 MLJ 817; [2011] 1 LNS 1763; *Hasrat Usaha Sdn Bhd v Pati Sdn Bhd* [2011]

3 MLJ 343; [2011] 2 CLJ 863; *Medallion Builders Sdn Bhd v Sinarlim Sdn Bhd* [2010] MLJU 1707; *Azure Precision (M) Sdn Bhd v John While Springs (S) Pte Ltd* [2003] MLJU 358 and *Dato' Tai Boon Tatt v Alaf Pelangi Sdn Bhd* [2011] 1 LNS 301.

[35] Notwithstanding the opinions of the experts presented to this court, it is incumbent on this court to decide as a question of fact what the foreign law is. The experts are not entitled to decide the issue, their views are merely there to provide assistance and guidance to this court. In the case of *The H156* [1999] 3 SLR 756, His Lordship Gp Selvam stated that:

> The function of an expert on foreign law is to submit the proposition of foreign law as fact for the consideration of the court. The court will then make its own findings of what the foreign law is. Even though the expert may submit his conclusions, he must present the materials and the grounds he uses to make his conclusions. The expert may not usurp the function of the court and present his finding. Further, he cannot decide the issue by applying the law to the facts without setting out the law and the reasoning process.

[36] In the light of the contemporaneous documents showing the express admissions by the plaintiff of the September installment and the expert opinion of Mr Rim on this issue (which is not rebutted by Mr Suhr), it is my finding that the September installment is not bona fide disputed on substantial grounds by the plaintiff.

CONCLUSION

[37] In conclusion, it is my opinion that the plaintiff has failed to establish that the September installment is bona fide disputed on substantial grounds. On the contrary, the contemporary documents show that the September installment is acknowledged, accepted and admitted by the plaintiff. Therefore, the defendant should not be prevented from exercising its statutory right to present a winding up petition against the plaintiff for its failure to comply with s 218 notice. In the circumstances, the originating summons was accordingly dismissed with costs.

Originating summons dismissed with costs.

Reported by Kanesh Sundrum